

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.

FILED

APR 17 1940

CHARLES ELMORE COOPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939

No. 726 15

FLEISHER ENGINEERING & CONSTRUCTION CO.,
AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH
A. BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENE-
FIT OF GEORGE S. HALLENBECK, DOING BUSINESS
UNDER THE ASSUMED NAME AND STYLE OF HALLEN-
BECK INSPECTION AND TESTING LABORATORY.

PETITION AND NOTICE OF APPLICATION FOR RE-HEARING ON CERTIORARI

FRANK GIBBONS,
Counsel for Petitioners.

BLANK PAGE

SUBJECT INDEX.

| | PAGE |
|---|------|
| Notice of Motion for Re-Hearing | 1 |
| Petition for Re-Hearing of Application for Certiorari.. | 2 |
| Exhibit C—Decision of Sixth Circuit Court of Appeals. | 6 |
| Exhibit D—Stipulation setting forth portions of the record so far as pertinent hereto upon which Decision of Sixth Circuit Court of Appeals was rendered..... | 7 |
| Suggestions in Support of Foregoing Motion..... | 11 |

STATUTE CITED.

| | |
|---|-------|
| Miller Act of August 24, 1935, 40 U. S. C. A. Section 270 b | 3, 11 |
|---|-------|

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 726

NOTICE OF MOTION FOR RE-HEARING

FLEISHER ENGINEERING & CONSTRUCTION CO.,
AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH
A. BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENE-
FIT OF GEORGE S. HALLENBECK, DOING BUSINESS
UNDER THE ASSUMED NAME AND STYLE OF HALLEN-
BECK INSPECTION AND TESTING LABORATORY,
Plaintiff-Respondent.

*To the Above Named Respondent and to Edwin J. Culligan,
Esq., Counsel for Respondent:*

YOU WILL PLEASE TAKE NOTICE that the attached
motion will be presented to the Supreme Court of the
United States, at the Court Room of the said Court, in the
City of Washington, D. C., on the 22nd day of April, 1940,
for hearing and determination.

Dated Buffalo, N. Y. April 16, 1940.

FRANK GIBBONS,
Counsel for the Petitioners,

RECEIVED copy of the foregoing notice and motion this
16th day of April, 1940, hereby admitted to be timely.

EDWIN J. CULLIGAN,
Counsel for the Respondent.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

No. 726

PETITION FOR RE-HEARING OF APPLICATION FOR
CERTIORARI

FLEISHER ENGINEERING & CONSTRUCTION CO.
AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH
A. BASS CO., ROYAL INDEMNITY COMPANY, AND
MARYLAND CASUALTY COMPANY, DEFENDANTS-
APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA, FOR THE USE AND BENE-
FIT OF GEORGE S. HALLENBECK, DOING BUSINESS
UNDER THE ASSUMED NAME AND STYLE OF HALLEN-
BECK INSPECTION AND TESTING LABORATORY,
APPELLEE IN COURT BELOW,

Plaintiff-Respondent.

*To the Honorable Chief Justice of the United States and
the Honorable Associate Justices of the United States
Supreme Court:*

Fleisher Engineering & Construction Co., Joseph A. Bass,
doing business as Joseph A. Bass Co., Royal Indemnity
Company, and Maryland Casualty Company, respectfully
show:

That heretofore and on the 14th day of February, 1940,
your petitioners filed in the office of the Clerk of the United

States Supreme Court their petition and brief praying for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit rendered in the above entitled cause on the 12th day of December, 1939, which construed the provisions of the so called Miller Act of August 24, 1935, 40 U. S. C. A. Section 270 b, to the effect that written notice sent to the contractor by ordinary mail and not by registered mail was a compliance with the statute, it being proven that the document was actually received by the addressee.

Your petitioners respectfully refer to their aforesaid petition and brief and incorporate the same herein as if set out in full.

Since that time, to wit on March 12, 1940, a decision has been rendered by the United States Circuit Court of Appeals for the Sixth Circuit in an action wherein United States of America for the use and benefit of John A. Denie's Sons Co. were appellants, and Joseph A. Bass, etc. *et al.*, were appellees, which is exactly contrary to and in conflict with the aforesaid decision of the United States Circuit Court of Appeals for the Second Circuit. A true and correct copy of the decision so rendered by the Sixth Circuit Court of Appeals is hereto annexed and marked Exhibit C.

Your petitioners further show that they have been informed by the counsel for the successful party in said action and they verily believe that no opinion was written by any member of the United States Circuit Court of Appeals for the Sixth Circuit at the time of the rendition of the said decision, excepting only the memorandum thereof contained in the decision itself, and that the said decision has not yet been published in the Federal Reporter or in any other report so far as your petitioners know or can ascertain.

Your petitioners further show that the aforesaid decision of the United States Circuit Court of Appeals for the Sixth Circuit was not brought to the attention of this Honorable Court at the time its aforesaid petition was presented for the reason that the same had not then been rendered; that your petitioners became informed of the existence of the action in which said decision was rendered and of the decision made therein on the 25th day of March, 1940; that at once copy of the same was mailed to the clerk of this court with a further petition praying that the same might receive the attention of this court upon the hearing under their aforesaid petition, but that about one hour after the same had been mailed a telegram was received by your petitioners' counsel announcing the decision of this court denying your petitioners' application for certiorari.

Your petitioners further show that it is their belief that if this Honorable Court had been informed of the said decision of the United States Circuit Court of Appeals for the Sixth Circuit that a case would have been presented, whereby it would have been found that the decision of the of the United States Circuit Court of Appeals for the Second Circuit sought to be reviewed would be in conflict with the decision of another Circuit Court of Appeals, to wit the United States Circuit Court of Appeals for the Sixth Circuit on the same matter within the meaning of the provisions of Rule 38-5 (b), and would have furnished a good reason for the exercise of the discretion of this court in your petitioners' favor upon such application.

Your petitioners, therefore, respectfully pray that an order may be made revoking the order heretofore made by this court on the 25th day of March, 1940, denying your petitioners' application for a writ of certiorari and directing that the same be reheard upon their aforesaid petition and this petition which may be treated as a supplementation thereof.

That hereto annexed and marked Exhibit D is a stipulation setting forth the portions of the record so far as pertinent hereto upon which the aforesaid decision of the Sixth Circuit Court of Appeals was rendered.

FLEISHER ENGINEERING & CONSTRUCTION CO.

JOSEPH A. BASS

ROYAL INDEMNITY COMPANY

MARYLAND CASUALTY COMPANY

By FRANK GIBBONS

Their Counsel

FRANK GIBBONS

Counsel for Petitioners.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.:
CITY OF BUFFALO. }

FRANK GIBBONS, being duly sworn, says that he resides in the City of Buffalo, N. Y. and is counsel for the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the statement of facts therein set forth are true to the knowledge of deponent.

FRANK GIBBONS

Subscribed and sworn to before me this 16th day of April, 1940.

GERTRUDE B. TOWNSEND,

Notary Public, Erie Co. N. Y.

(SEAL)

I, FRANK GIBBONS, of the City of Buffalo, County of Erie and State of New York, counsel for the above named petitioners, Fleisher Engineering & Construction Co., Joseph A. Bass, Royal Indemnity Company and Maryland Cas-

ualty Company, do hereby certify that the foregoing petition for a re-hearing of this cause is presented in good faith and not for delay.

Dated Buffalo, N. Y. April 16, 1940.

FRANK GIBBONS
Counsel for the Petitioners.

EXHIBIT C

No. 8196

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT

UNITED STATES OF AMERICA, FOR THE USE
AND BENEFIT OF JOHN A. DENIE'S SONS CO.,
Appellants,

—v—

JOSEPH A. BASS, ET AL.,

Appellee.

Order

Before SIMONS, ALLEN and HAMILTON, *Circuit Judges*.

In a suit in the name of the United States for the use and benefit of a subcontractor against the principal contractor and his sureties upon a bond for public work under the Heard Miller Act (40 U. S. C. A. 270), tried to the court without a jury,

It appearing that the court overruled a claim of the use plaintiff on the ground that not having any contractual relationship express or implied with the principal contractor, he had not given the statutory written notice by registered mail as provided by Section 270b(a), and

It appearing to the court that no challenge is made by the appellant to the findings of fact of the District Judge as unsupported by evidence, and it appearing to us that there was no error in the conclusions of law arrived below, since it is the view of this court that the statutory require-

ment of notice being unequivocal and without ambiguity is a jurisdictional prerequisite governed by *Texas Cement Co. vs. McCord*, 233 U. S. 157, in that the present statute, as that there interpreted, likewise "created a new liability and gives a special remedy for it, and upon well-settled principles the limitation upon such liability becomes a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself," and the court being further of the view that the decision in *A. Bryant Co. vs. New York Steam Fitting Co.*, 235 U. S. 327, does not militate against this conclusion,

IT IS HEREBY ORDERED That the judgment below be and it is hereby affirmed.

APPROVED FOR ENTRY:

(S) CHARLES C. SIMONS
United States Circuit Judge

FILED: March 12, 1940.

EXHIBIT D

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

STIPULATION

FLEISHER ENGINEERING & CONSTRUCTION Co. and JOSEPH A. BASS, doing business as Joseph A. Bass Co., ROYAL INDEMNITY COMPANY, and MARYLAND CASUALTY COMPANY,
Defendants-Appellants in Court Below, Petitioners,

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, *Appellee in Court Below, Plaintiff-Respondent*

IT IS HEREBY STIPULATED that the document hereto annexed and marked Exhibit C is a true and correct copy of the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit, filed in the office of the clerk of that court on March 12, 1940, in the action therein pending entitled United States of America, for the

use and benefit of John A. Denie's Sons Co., Appellants, against Joseph A. Bass, *et al.*, Appellees.

IT IS FURTHER STIPULATED that the cause in which the aforesaid judgment was rendered was upon appeal from a judgment rendered by the United States District Court for the Western Division of the Western District of Tennessee, entered October 28, 1938; that the said judgment was rendered after a trial before the Hon. John D. Martin, Judge of the said court, without a jury; that at the conclusion of the said trial the said judge rendered findings of fact and conclusions of law in writing, pursuant to which the said judgment was entered, which findings of fact so far as pertaining to any question before this Honorable Court are as follows:

"8. That the use plaintiff failed to serve any notice by registered mail or in the manner in which a summons may be served by marshal, as provided for by the statute, but the court finds that the said Bass had actual knowledge of the unpaid amount claimed and had said actual knowledge prior to and within ten days subsequent to the death of Sutton.

9. That in addition to the said material hereinabove described and referred to, the said use plaintiff sold, furnished and delivered to H. S. Sutton, a subcontractor of said Bass upon said job certain additional material, all of which was paid for except material of the reasonable value and agreed price of \$1812.99, that of the payments made on account of said materials which have been deducted in arriving at said balance of \$1812.99, \$1000.00 of such payments was represented by a check sent by said Bass on his own checking account to the said use plaintiff and by it credited on said account, the said payment having been made by the said Bass April 14, 1937, at the request of the said use plaintiff. . . .

13. The use plaintiff reserves exceptions for the failure of the court in failing to allow the book balance of \$1812.99 due on the Sutton account and the use plaintiff excepts to the failure of court in refusing to allow a charge back into the account of said Bass the credits of \$2513.59, together with all proper interest charges and such exceptions are allowed.

14. And the use plaintiff further excepts to the action of the court in holding that any statutory notice was necessary and in not holding that actual knowledge was sufficient under the facts and circumstances; and the use plaintiff further excepts to the action of the court in failing to hold there was an implied or *quasi* promise on the part of said Bass to pay the amounts due from the sub-contractor at the time of his death and the completion of the work by said Bass."

IT IS FURTHER STIPULATED that upon the trial of the said action oral evidence was given upon the question of notice as follows:

A contract was made between the contractor and one Sutton, a subcontractor, whereby the said Sutton undertook to furnish lathing and plastering, both labor and materials, for the sum of \$15,550.00. Before his contract was completed, to wit on March 9th, 1937, he died and other provisions were made for the completion of the contract. At the time of the death of the said Sutton there was a balance owing to the use plaintiff, John A. Denie's Sons Company for labor and materials furnished to Sutton by it to the amount of \$2485.64. About a week or ten days after the death of Mr. Sutton, one of the witnesses on behalf of the use plaintiff met the contractor and told him how much the Sutton account amounted to and continued, "We were discussing the plastering contract generally and he stated to me that he would employ Sutton's son to act as foreman and to look after the work, and for us to go ahead and furnish the material and he would see that they were taken care of." On April 6th, 1937, the witness wrote a letter to the contractor dated on that day, which reads as follows:

"April 6, 1937

Jos. A. Bass Co.,
332 Sexton Bldg.,
Minneapolis, Minn.

Dear Mr. Bass:

This is just to remind you of our conversation in your office on Monday of this week at which time you stated you would send us a check on Saturday, April 10th, for your account as represented by statement handed you, showing the status of the account with all

credits allowed as of March 31st, 1937, a balance of \$3366.28. And at that time you also stated you would include a separate check for a substantial payment on the Sutton account.

Thanking you kindly for your usual promptness, we are,

Yours very truly,

Secretary-Treasurer."

In reply to that letter of April 6th, 1937, the use plaintiff received from the contractor a letter dated April 14, 1937, which reads as follows:

"April 14, 1937

John A. Denie Sons Co.,
Memphis, Tenn.

Re: U. S. MARINE HOSPITAL,
Memphis, Tennessee

Dear Morrie:

In regard to your letter of April 12th, I wish to state that there is quite a difference between your statement and our statement and of course until we check it up we will not be able to state how much the difference is. We have been very busy and have not had time. In the first place there is a considerable amount of empty bags that we have not had the proper credit for and we did not know that you were anxious to receive payment right up to the last dollar. I didn't expect to pay right up to March 31st. You must realize that I have a considerable amount of money that has been held back by the Government—something like \$60,000.00 that the Construction Engineer has not been quite fair about allowing the real amount of my estimate. Therefore, I must say that I was just cutting the corners a little bit.

As far as the Sutton account is concerned, I am mailing you a check for \$1,000.00 to apply on their account.

Now, if it is necessary for you to have any more money on our account—if you MUST have it—please do not hesitate to write me further and we will endeavor to do something about checking into the account.

As far as promises that I have made to Mr. Bartholomew—all I told him is that I would send him a substantial amount of money. I made no particular reference

to the amount. I am very sorry that he misconstrued my meaning.

Yours very truly,

JOSEPH A. BASS COMPANY
By JOS. A. BASS''

IT IS FURTHER STIPULATED that the aforesaid copy of decision, Exhibit C, may be used by the petitioners upon application for a rehearing of their application for a writ of certiorari in all respects as if duly and properly certified by the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, said certification being hereby waived, and that the facts set forth in this stipulation may be received in all respects in the place and stead of the transcript of record now on file in the said clerk's office duly certified as such, and that the foregoing statement constitutes all of the evidence contained in the said transcript material to any matter upon this application.

Dated, Buffalo, N. Y., April 16, 1940.

FRANK GIBBONS,
Counsel for Petitioners.

EDWIN J. CULLIGAN,
Counsel for Respondent.

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION

From the petition for certiorari referred to in the foregoing petition and filed in the office of the Clerk of the United States Supreme Court on February 14, 1940, and the record of the United States Circuit Court of Appeals, for the Second Circuit, in the above entitled cause, it appears that the decision sought to be reviewed construes the provisions of the so-called Miller Act of August 24, 1935, 40 USCA 270-b on the subject of notice required to be given by one who has no contractual relations with the contractor but who has furnished materials or labor to a subcontractor on government work, so that such a person may recover upon the pay-

ment bond furnished by the contractor, if he shall have given written notice to the contractor by ordinary mail instead of by registered mail, upon proof that the written notice was actually received by the contractor.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit referred to in the foregoing petition, copy of which is attached thereto as Exhibit C, is believed to be contrary to and in conflict with the aforesaid decision of the United States Circuit Court of Appeals for the Second Circuit.

Inasmuch as the decision of the United States Circuit Court of Appeals for the Sixth Circuit was not rendered until March 12, 1940, it was not, and could not have been brought to the attention of the court in the original petition for certiorari filed on February 14, 1940.

The importance of a final determination of the question which shall be uniform throughout the United States is self-evident. All contractors in government work, their sub-contractors and materialmen, as well as their sureties, and the government itself, ought to be able to know the correct rule of law in that respect to enable them to determine by what rules they must be governed.

It is important to all parties above mentioned that the foregoing question be speedily decided to avoid confusion and expense.

Respectfully submitted,

FRANK GIBBONS,
Counsel for the Petitioners.

BLANK PAGE